BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANA M. BAEZA	)	
Claimant	)	
VS.	)	
	)	Docket No. 187,168
NATIONAL BEEF PACKING CO.	)	
Respondent	)	
AND	)	
	)	
LUMBERMEN'S UNDERWRITING ALLIANCE	)	
Insurance Carrier	)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Pamela J. Fuller on October 23, 1998. The Appeals Board heard oral argument May 18, 1999.

APPEARANCES

Lawrence M. Gurney of Wichita, Kansas, appeared on behalf of claimant. Shirla R. McQueen of Liberal, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found that claimant had suffered personal injury by accident arising out of and in the course of her employment, with June 18, 1993, as the date of accident, but that she suffered no permanent disability.

On appeal, claimant argues that she has a compensable permanent disability and, in fact, is entitled to benefits based on work disability.

Respondent argues the Award should be affirmed. If it is not affirmed, respondent argues claimant failed to give timely notice. Respondent also argues that any award should

be limited to functional impairment because respondent offered employment at a comparable wage but claimant did not attempt the work. Finally, respondent argues that the date of accident should be in June 1993 and this should, therefore, be treated as an "old-Act" case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that claimant should be entitled to benefits for a 35 percent work disability for accidental injury on February 4, 1994.

Findings of Fact

1. Beginning in June 1993, claimant developed problems with both wrists and hands, as well as her right shoulder, from her work activities. At that time, her job was a cap meat job. Claimant reported the problems to the plant physician, Dr. Edwards. Dr. Edwards treated claimant with medications and physical therapy and then referred claimant to Dr. Harrington. Dr. Harrington eventually referred claimant to Dr. Grace L. Stringfellow, a physiatrist.

2. Dr. Stringfellow treated claimant from November 1993 through March 1994. At the first examination, November 11, 1993, claimant reported injury to both of her arms and shoulders. Following examination, Dr. Stringfellow concluded claimant had tendonitis affecting the left upper extremity more than the right. She recommended claimant limit her lifting to 20 pounds occasionally; limit stooping and bending to occasionally; limit her left hand grasping, pushing, pulling, and fine manipulations to never; limit the same activities on the right to occasionally; and do no knife work.

Dr. Stringfellow next saw claimant November 18, 1993. At this time, Dr. Stringfellow had the results from nerve conduction studies. The results were normal. Claimant had the same symptoms at this visit, and Dr. Stringfellow recommended continuing the same restrictions.

Dr. Stringfellow saw claimant again December 16, 1993. By this time, claimant had undergone physical therapy with little relief. Dr. Stringfellow concluded claimant had reached maximum medical improvement. Dr. Stringfellow scheduled an additional appointment for the purpose of an examination to determine the appropriate impairment rating.

But when Dr. Stringfellow saw claimant again on January 6, 1994, she ordered an MRI examination because claimant continued to complain of pain and loss of sensation. The MRI revealed a very mild bulging at C6-7 which Dr. Stringfellow considered to be a benign finding.

On March 2, 1994, Dr. Stringfellow did an examination for rating purposes. She found loss of motion in the cervical spine and right shoulder and reduced grip strength, especially for her dominant hand. Dr. Stringfellow assigned a rating of 20 percent impairment to the right upper extremity, which she converted to 12 percent of the whole body, and 4 percent of the whole person for cervical problems. She combined these ratings to arrive at a whole body impairment rating of 17 percent.

Dr. Stringfellow recommended permanent restrictions as follows:

(a) Limit lifting to 10 pounds continuously, 20 pounds frequently, and no more than 20 pounds.

(b) Can work stooping/bending tasks frequently.

(c) Can reach above the shoulder occasionally.

(d) Can perform grasping, pushing, and pulling with the left hand frequently, and with the right hand occasionally.

(e) No use of hook or knife.

Dr. Stringfellow reevaluated claimant in April 1996. Her findings were essentially the same as before and she recommended continued nonrepetitive light category of work.

3. Dr. Stringfellow took claimant off work February 4, 1994, and when she imposed permanent restrictions in March 1994, respondent could not accommodate those restrictions and referred claimant to Dr. C. Reiff Brown for additional evaluation.

4. Dr. Brown saw claimant April 27, 1994. He found some element of biceps or rotator cuff tendinitis and physical deconditioning of the musculature of the shoulders and trunk. He considered some of the complaints to be unexplainable. He noted that the previous FCE was considered invalid and indicated gross exaggeration and possible malingering. Nevertheless, Dr. Brown rated claimant's impairment as a 4 percent impairment of the whole body. But Dr. Brown also testified that if he were going strictly by the AMA Guides, the impairment rating would be 0 percent because claimant had no loss of range of motion. He also recommended claimant avoid repeated use of hands above shoulder level and avoid repeated use of the hands at waist level in an approximately two-foot radius. He reviewed a video provided by respondent showing the assembly line in a beef packing plant and testified the job shown was one claimant could perform. The job shown was that of a No. 1 trimmer.

Dr. Brown reviewed a list of the tasks claimant had done in the 15 years before the accident. Of the total of 14 tasks, Dr. Brown initially identified only 2 claimant cannot do. But on cross examination, he agreed that 3 additional tasks—prep work for painting,

washing cars, and cleaning windows—were tasks claimant cannot do, for a total of 5 of the 14 tasks or 36 percent.

5. The Administrative Law Judge ordered an independent medical examination by Dr. Ernest R. Schlachter. The report from Dr. Schlachter, dated August 1, 1994, states that the exam was normal. Dr. Schlachter recommended no restrictions and provided no rating. He stated there was no evidence of overuse syndrome, tendonitis, carpal tunnel syndrome, or other work-related injury.

6. In October 1994, respondent offered claimant work which it believed to be within Dr. Brown's restrictions, a No. 1 trim position. Claimant declined the job and respondent terminated claimant from its employment. Claimant testified the job was essentially the same as the job she had been doing and she did not believe she could do the job.

7. Claimant's counsel referred claimant to Dr. Pedro A. Murati for additional evaluation. Dr. Murati rated the impairment as 12 percent of the whole body according to the AMA Guides. He opined that claimant cannot now do 8 of 13 tasks for a 62 percent loss. His rating was for the crepitus in the thumb and elbows and a neck strain. He did not rate the shoulders because he found no loss of range of motion and did not believe claimant had tendinitis. Dr. Murati was aware of the results of the earlier FCE, found to be invalid, but testified that the person who performed this FCE typically finds an invalid result.

Dr. Murati recommended as restrictions that claimant can do frequent repetitive work but no heavy grasping, only occasional above-shoulder work, no reaching above 18 inches, no awkward neck positions, and only occasional ladders and crawling. He recommended claimant limit lifting to 35 pounds occasionally, 20 pounds frequently, and 10 pounds constantly.

8. Based on the testimony of Karen C. Terrill, the Board finds after the injury claimant remains able to earn $5.50 to $6 per hour.

9. Since leaving work for respondent, claimant has worked only one part-time job, two hours per day, and except for casual inquiry from friends, has not attempted to find other employment. The Board does not consider claimant's efforts to be a good faith effort to find employment.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. The Board concludes the date of accident in this case should be February 4, 1994. Claimant left work because of the injury and that was the last date claimant worked for respondent. *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261

(1994). *Alberty v. Excel Corp.*, 24 Kan. App. 2d 678, 951 P.2d 967, *rev. denied* 264 Kan. ___ (1998).

3. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

4. K.S.A. 44-510e also specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the preinjury average weekly wage.

5. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

6. Based on the *Foulk* decision, respondent contends claimant should, when considering work disability, be treated as though she remained in respondent's employ in the No. 1 trimmer position respondent offered claimant, a job which paid the same wage claimant was earning at the time of the injury. The consequence would be that claimant would be limited to disability based on functional impairment. But the Board does not believe the principle stated in the *Foulk* decision applies here. The Board finds claimant acted in good faith when she declined the position. The primary treating physician imposed restrictions which would be violated by the duties in that job. Claimant was familiar with the job and believed she could not do it. Even though Dr. Brown and Dr. Schlachter would have allowed her to perform the job, the Board does not believe she acted in bad faith when she relied on her own knowledge and the restrictions of the primary treating physician.

7. The Board concludes claimant did not make good faith effort to find work after leaving respondent. As a consequence, a reasonable wage must be imputed to her.

Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). Based on the testimony of Ms. Terrill, the Board concludes claimant can earn $5.75 per hour and a wage of $230 per week should be imputed to her. When compared to the stipulated average weekly wage of $346.78, the wage which includes fringes which would be applicable after claimant left employment for respondent, the wage loss is 34 percent.

8. Based on the testimony of Dr. Brown, the Board finds claimant has a task loss of 36 percent. The Board believes a higher loss might be appropriate, but claimant has not met her burden. Dr. Stringfellow has concluded her restrictions may not be appropriate and the Board will, for that reason, not rely on those restrictions. On the other hand, the Board considers the restrictions of Dr. Murati and resulting task loss to exaggerate claimant's loss. The Board, therefore, reverts to the task loss of Dr. Brown as the maximum proven loss.[1]

9. Based on a 34 percent wage loss and a 36 percent loss of ability to perform tasks, claimant has a 35 percent work disability. K.S.A. 44-510e.

10. Claimant gave notice earlier than ten days after the date of accident. Respondent contends claimant did not give notice because, even though claimant gave notice and respondent provided medical treatment before February 4, 1994, the date of accident, claimant did not give notice of a February 4, 1994, accident within ten days after that date. The Board has previously held and holds again here that notice before what ultimately becomes the date of accident for a repetitive trauma injury may satisfy the statutory requirement and did so in this case.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Pamela J. Fuller on October 23, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ana M. Baeza, and against the respondent, National Beef Packing Co., and its insurance carrier, Lumbermen's Underwriting Alliance, for an accidental injury which occurred February 4, 1994, and based upon an average weekly wage of $346.78, for 32 weeks of temporary total disability compensation at the rate of $221.81 per week or $7,098.84, followed by

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[1] The Board acknowledges the possible appearance of inconsistency in relying on Dr. Brown's restrictions while at the same time not insisting that claimant follow the opinion of Dr. Brown that claimant could do the trimmer job. But the Board has concluded only that claimant acted in good faith in rejecting the job offer because of Dr. Stringfellow's restrictions. In addition, the Board considers the task loss opinion of Dr. Brown to be the extent of loss proven. The Board believes the loss, in fact, may have been higher but how much higher is not established.

139.30 weeks at the rate of $231.20 per week or $32,206.16, for a 35% permanent partial disability, making a total award of $39,305.00, all due now in one lump sum less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of June 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lawrence M. Gurney, Wichita, KS
Shirla R. McQueen, Liberal, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director